A BHAGWAN SINGH AND ORS.

v.

STATE OF M.P.

JANUARY 23, 2003

B [S. RAJENDRA BABU, D.M. DHARMADHIKARI AND G.P. MATHUR, JJ.]

Criminal Trial:

C *Testimony of child witness—Reliability—Prosecution case that child eye-witness to murder—Trial Court rejecting the version of the child due to certain omissions—High Court relying on the testimony convicted the accused—On appeal held, since testimony of child witness suffers from infirmities, evidence of child witness is unreliable to convict the accused—Penal Code, 1860 Section* D *302.*

Test identification parade—Necessity of—Discussed.

Code of Criminal Procedure, 1973:

E *Sections 164 and 313—Extra-judicial confession—Reliability of—Held, when judicial confession is not given voluntarily and more so when it is retracted it is unreliable.*

Section 368—Appeal against acquittal—High Court re-appreciating the evidence and setting aside the acquittal—Justification of—Held: On facts, F *appreciation of evidence by trial Court proper and conclusions drawn reasonable—Thus, High Court not justified in setting aside the acquittal order.*

M.P. (Dacoity Vihavaran Kshetra) Act, 1981—Section 11/13—Applicability of—Held: Incident occurred in village which comes under dacoity affected area, thus provisions of Act applicable.

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According to the prosecution, appellant No.1 hatched a plan to kill M with the help of other appellants and co-accused. They entered the house of M in the midnight and hanged him after killing and also killed his daughter. At the time of the incident, son of M's daughter aged about six years along with her younger brothers was sleeping in M's house and

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witnessed the incident. It is alleged that the motive for crime was a civil dispute pending in court between appellant No.1 and M. Accused were charged for the offence committed under Sections 302/34, 396, 460, 404 IPC and Section 11/13 of M.P. (Dacoity Vihavaran Kshetra) Adhiniyam, 1981. Trial Court acquitted them. However, High Court convicted the appellants and acquitted the co-accused. Hence the present appeal. A B

Appellant contended that eye-witness account of child witness and judicial confession of co-accused recorded were unreliable and were rightly rejected by trial court; and that High Court has not given any justifiable and convincing reasons to upset the verdict of trial court and convicting the accused on such weak evidence. C

Allowing the appeal, the Court

HELD: 1.1. The law recognizes the child as a competent witness but a child particularly at such a tender age of six years, who is unable to form a proper opinion about the nature of the incident because of immaturity of understanding, is not considered by the court to be a witness whose sole testimony can be relied without other corroborative evidence. The evidence of child is required to be evaluated carefully because he is an easy prey to tutoring. Therefore, the court always looks for adequate corroboration from other evidence to his testimony. [516-D, E] D E

Panchhi and Ors. v. *State of U.P.*, [1998] 7 SCC 177 and *State of Assam* v. *Mafizuddin Ahmed,* [1983] 2 SCC 14, referred to.

1.2. In the instant case, although the child witness had named accused in his statement under Section 161 Cr.P.C., accused were not arrested soon thereafter. There is no explanation in the record for this delay and also no test identification parade was held. The child is said to have identified them in the court when they were in the dock and this identification cannot be accepted with certainty as a reliable identification. Further after the incident, the child witness first met his maternal uncle who was not examined as a witness and prosecution offered no explanation for the same. Also the child's father in his statement did not state that after the incident the child had disclosed to him the names of the assailants which is unnatural. Trial Court recorded demeanour of the child. The child was vacillating in the course of his deposition. Taking into consideration the child psychology, witnessing his mother being assaulted by known persons the child would have raised a cry; but he says he quietly went back to F G H

A sleep, and woke up late in the morning only when his maternal uncle came to fetch him. Further from a child of six years of age, absolute consistency in deposition cannot be expected, but, the evidence of child witness suffers from serious infirmity and makes his evidence highly unreliable for basing conviction. [516-F, G, H; 517- A, G; 516-C]

B *Japal Singh* v. *State of Punjab,* [1996] 4 Crimes 74 (SC), referred to.

1.4. High Court's holding that since the accused was already known to the child, it was not necessary to hold the test identification parade is unconvincing. Child was aged six years at the time of the incident. He used to live with his father and mother. Some of the witnesses have stated that C he used to come off and on with his mother and younger brothers to live with his grandfather. Looking to his age and understanding even though he might have identified appellant No.1 who lived in the neighbourhood, it was most unlikely that he would have known other two accused who were merely residents of the same village. Therefore, High Court was D unjustified in taking a view of the testimony of child witness contrary to the one taken by trial Judge and relying on it to convict the accused. [518-C, D, E]

2.1. A judicial confession not given voluntarily is unreliable more so when such a confession is retracted. It is not safe to rely on such judicial E confession or even treat it as a corroborative piece of evidence in the case. When a judicial confession is found to be not voluntary and more so when it is retracted, in the absence of other reliable evidence, the conviction cannot be based on such retracted judicial confession. *Shankaria* v. *State of Rajasthan,* [1978] 3 SCC 435 , referred to. [520-C, D]

F 2.2. In accordance with the requirement of Section 164 Cr.P.C., Judicial Magistrate is required to prevent forcible extraction of confession by the prosecuting agency. Magistrate in particular should ask the accused as to why he wants to make a statement which surely shall go against his interest in the trial. He should be granted sufficient time for reflection and G also be assured of protection from any sort of apprehended torture or pressure from police in case he declines to make a confessional statement. [519-E, F]

State of U.P. v. *Singhara Singh,* AIR [1964] SC 358 and *Shivappa* v. *State of Karnataka,* [1995] 2 SCC 76, referred to.

H 2.3. In the instant case extra judicial confession of the acquitted

accused was recorded by the Judicial Magistrate when he was produced hand cuffed before him in police custody. The Magistrate in deposition does say that he questioned accused and the latter confirmed that he was making a statement voluntarily without any pressure. But the record of confession does not show that any specific questions were put to accused whether any physical or mental pressure was put on him by the investigating agency. The confession is also not recorded in questions and answers form which is the manner indicated in the criminal court rules. The confession was retracted in writing before the trial judge by the accused where he disclosed that he was produced for judicial confession by telling him that he would be a prosecution witness as an approver. He also gave a statement that he was physically tortured and threatened by the police to agree for giving a false confession. It is also stated that the police had met him in the jail and his signature was obtained on a statement. The accused was in the custody of police immediately preceding the making of the confession. All these circumstances are sufficient to stamp the confession as involuntary and hence unreliable.

[518-G, H; 519-A, D]

3. Neither the sole testimony of child witness nor the extra judicial confession conclusively prove the involvement and guilt of the three accused. In these circumstances, the evidence of recoveries of certain articles of the deceased which are very ordinary articles of not much value which are alleged to have been stolen by the accused is too weak a piece of evidence to sustain the conviction of accused. There is also an attempt of fabricating some artificial evidence against accused. Prosecution has tried to rope in appellants in the crime and have overdone their job by fabricating false evidence of overhearing by witnesses the plan of murder and openly discussing about it after the completion of the plan. This evidence was rightly not believed by trial court and High Court.

[520-E; 521-A, B]

4. With regard to motive, no doubt there was a civil dispute pending between deceased and appellant No. 1 but that is not a strong motive for committing such a ghastly crime. At worst it raises strong suspicion against the accused. [520-G]

5. In appeal against acquittal, High Court is competent to reappreciate evidence to find out whether the trial Judge has misappreciated any part of the evidence or not. In the instant case, appreciation of the evidence made by trial Judge is proper and the conclusions drawn are reasonable. Therefore,

High Court erred in reappreciating the evidence to substitute its own view for that of the trial Judge and was not at all justified in reversing the verdict of acquittal passed by trial Judge. 6. The village where incident occurred comes under dacoity affected area to which provisions of M.P. (Dacoity Vihavaran Kshetra) Act, 1981 are applicable. In such circumstances, possibility of commission of the alleged crime by unknown criminals is not wholly ruled out. [520-H; 521-A; 521-C, D]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 789 of 2002.

From the Judgment and Order dated 11.3.2002 of the Madhya Pradesh High Court in Crl. A. No. 163 of 1986.

Dr. T.N. Singh, Lakhan Singh Chauhan C.M. Patel and Anil Shrivastav for the Appellants.

Ms. Vibha Datta Makhija and Ms. Bharati Tyagi, for the Respondent.

The Judgment of the Court was delivered by

DHARMADHIKARI, J. The High Court of Madhya Pradesh Bench at Gwalior by impugned Judgment 11.3.2002, reversed the verdict of the trial court and convicted the three appellants before us for the offences for which they were charged and sentenced them to imprisonment for life and fine of Rs. 10,000/- each with directions that they shall suffer RI for one year in default for payment of fine.

The present three appellants were acquitted along with the co-accused Pooran Singh by the Court of Special Judge, Bhind by Judgment dated 06.9.1985 for offences alleged to have been committed by them under Sections 302/34, 396, 460, 404 of Indian Penal Code [for short 'I.P.C'] and Section 11/13 of M.P. [Dacoity Vihavaran Kshetra] Adhiniyam 1981.

The charge against them was that on the intervening night of 28th-29th February, 1984, they entered the house of deceased Mata Prasad. They killed him and hanged him in the house and also killed his daughter Munni Devi.

The case of the prosecution set up against the three accused and the fourth accused Pooran Singh is as follows :-

The motive of the crime is alleged to be a civil dispute pending in the civil court between accused Bhagwan Singh with his father Dayaram as one

party and the deceased Mata Prasad as their adversary. They all lived in the neighbourhood of each other in village Murawali, Tehsil Lahar, P.S. Daboh, District—Bhind. The civil dispute was regarding opening of a door for access to the Chabutara between the house of the parties. The deceased had filed a Civil Suit No. 566A of 1986 and obtained an injunction on 20.10.1983 against the accused Bhagwan Singh restraining the latter from opening any door or window towards the Chabutara of the plaintiff. A B

The case of the prosecution is that accused Bhagwan Singh, therefore, hatched a plan to kill Mata Prasad with the help of the other co-accused. To accomplish their plan, in the midnight intervening 28th 29th February, 1984 they entered the house of deceased Mata Prasad and by throttling him by neck, killed him and hanged him with the hook of the door in the house. They also killed his daughter Munni Devi who was found dead inside the house with burns. C

The main evidence led by the prosecution against the accused is the solitary testimony of alleged child eye-witness Arvind Kumar (PW-19) who was aged about six years at the time of the incident and the alleged judicial confession (Ex.P1) of acquitted co-accused Pooran Singh recorded under Section 164 of Criminal Procedure Code [for short 'Cr.P.C] by Shri D.K. Palliwal (PW-1), Judicial Magistrate Ist Class, Lahar. D

The other corroborative evidence relied by the prosecution is of alleged conspiracy regarding which the talks took place between the accused prior to and after the incident and were said to have been overheard by Kalka (PW-10), Kamlesh (PW-12), Deenanath (PW-17) and corroborated by Radheyshyam (PW-20) husband of deceased Munni Devi. The prosecution also led evidence that on information of the accused, domestic articles and valuables belonging to the house of the deceased were recovered from the possession of the accused. E F

At the outset, we may state that the oral evidence led by the prosecution against the accused of hatching a plan and talking about it before and after its accomplishment which was allegedly overheard by the witnesses has not been believed both by the trial court and as also the High Court. The trial court also totally rejected the evidence of alleged recovery of articles on the alleged information of the accused but the High Court has made a mention of recovery of few domestic articles as a corroborative evidence against the accused with which we shall deal at the appropriate stage of our Judgment. G H

A The High Court in reversing the verdict of acquittal and in convicting the three accused before us as appellants has mainly relied on the eye-witness account of the child witness Arvind Kumar (PW-19). It held that the judicial confession even though retracted and the recovery of certain articles from the accused belonging to the deceased are corroborative pieces of evidence to the testimony of sole child eye-witness Arvind Kumar (P W-19). On this evidence, B it is held that the offence alleged against the accused has been proved beyond doubt.

The learned senior counsel Dr. T.N. Singh appearing for the appellants/ accused took us through the evidence on record and submitted that both C alleged eye-witness account of child witness Arvind Kumar (PW-19) and alleged judicial confession (Ex.P1) recorded by the Judicial Magistrate were unreliable and were rightly rejected by the trial court. The High Court has not given any justifiable and convincing reasons to upset the verdict of the trial court and convicting the accused on such weak evidence. We have also heard the learned counsel appearing for the State of Madhya Pradesh who tried D utmost to support the judgment of conviction passed by the High Court.

Since the conviction is based mainly on the evidence of sole alleged child eye-witness Arvind Kumar (PW-19), we shall first take up for consideration that evidence to adjudge whether the High Court was justified E in taking a different view of his evidence and relying on it.

The incident took place on the intervening night of 28-29th February, 1984. The case of the prosecution is that the child eye-witness Arvind Kumar (PW-19) aged about six years was along with his two younger brothers sleeping with her deceased mother Munni Devi in the house of deceased F Mata Prasad. The Investigating Officer claims to have recorded statement of the child witness under Section 161 Cr.P.C on the next day of the incident i.e. 01.3.1984. In his deposition the child claims to have seen accused Bhagwan Singh catching hold of his mother by face and the co-accused Laxman Singh and Sultan Singh assaulting her. He also stated that there were two other persons present with the accused. After witnessing the incident, he got terrified G and went back to sleep. When he woke up in the morning, he found his grandfather Mata Prasad dead and hanging on the door of the house and mother lying burnt and dead. On seeing this ghastly scene, he again fell asleep inside the house. In the morning, his maternal uncle Agyaram came and took him and his younger brothers to village Alampur, where his father H Radheshyam (PW-20) lived.

The most striking feature of the case casting great doubt on the evidence of the child witness is the fact that although the child had named three appellants/accused in his statement under Section 161 Cr.P.C on 01.3.1984, the named accused were not arrested immediately thereafter. They were arrested as per the arrest memo (Ex.P18) on 12.3.1984. It is most unlikely that if the child had named the accused in his statement under Section 161 Cr.P.C on 01.3.1984, the accused could not have been arrested soon thereafter. There is no explanation in the record for this delay in the arrest of the three accused who were alleged to have been named by the child witness in his statement to the police.

The maternal uncle of the child Agyaram was the first person to meet child witness Arvind Kumar (PW-19). If the child had seen the incident and recognised the accused, Agyaram was the first person to whom the child would have disclosed the incident and the names of the assailants. The prosecution has not produced Agyaram as a witness in the case and has offered no explanation for withholding him from producing as a witness. This omission on the part of the prosecution for not producing Agyaram as a witness has been given great importance by the trial Judge in rejecting the version of the child amongst other reasons. The High Court, however, has overlooked this vital lapse in the prosecution evidence.

Radheshyam (PW-20), the father of the child and husband of deceased Munni Devi in his statement did not state that after the incident, the child witness Arvind Kumar (PW-19) had disclosed to him the names of the assailants. This infirmity in the evidence of Radheshyam and child witness has been tried to be explained by the High Court in paragraph 26 of impugned judgment stating that Radheshyam with the news of the murder of near and dear ones might have been perturbed and instead of interrogating his child, must have been busy in taking care of the dead bodies and in helping the police investigation.

The child witness was examined in the court as PW-19. His statement was recorded on 14.2.1985. In the period intervening the date of incident to the date of his deposition, there was sufficient time to tutor him for making a statement to involve the accused by names. Admittedly, even though child witness Arvind Kumar (PW-19) is alleged to have seen and named the three appellants/ accused on 01.3.1984 in his statement made to the police under Section 161 Cr.P.C., no test identification parade was held. The accused are said to have been produced in the court with their faces covered. They were

A then on the directions of the court asked to uncover their faces. The child is said to have identified them in the court when they were in the dock. This dock identification of the three accused by child witness in the court was not given importance by the trial Judge in the absence of any Test Identification Parade. The trial Judge recorded the demeanour of the child witness that he
B was pausing and sometimes faultering while deposing and did not seem to understand few questions put to him. The trial Judge, therefore, held that it would be hazardous to rely on such shaky testimony of a child witness who could have been tutored in the period intervening the date of incident and the date of his deposition.

C In appeal, the High Court relied on the sole testimony of the above eye-witness and brushed aside such serious omissions including not holding of test identification parade after the child witness had named the three assailants before the police. The High Court relied on dock identification stating that the child witness used to regularly visit his deceased grandfather Mata Prasad with his mother and was knowing since before the incident accused Bhagwan
D Singh living in the neighbourhood and other accused Sultan Singh and Laxman Singh who were also of the same village Murawali. The relevant part of the reasoning of the High Court contained in paragraphs 26 to 28, requires reproduction for considering whether the reasons and conclusions contained in the judgment of the High Court are justified for reversing the verdict of
E acquittal given by the trial Judge.

> "26. It has been argued for the respondent accused person that child witness Arvind was not taken immediately to police by his father Radhey Shyam and it is further surprising that Radhey Shyam had asked no details about the incident from any of his children. He has
F no knowledge as to when the police had recorded statement of Arvind Kumar. It means that Arvind Kumar was not present on the spot, however, in our opinion, Arvind Kumar aged bout six years, is the eldest child of deceased Munni Devi who could depose something about the incident. Rest of his younger brothers are too small to know
G about the incident and consequently, they were fast asleep at the time of incident. It is usually expected that the small children will accompany their mother when the mother is away from her husband and had gone to join her father deceased Mata Prasad. The witnesses who had visited the spot soon after occurrence also confirmed the presence of the children on the spot. In so far as the children not
H being interrogated immediately by their father, is due to the fact that

the father was not much perturbed at the news of the incident and immediately rushing to the spot and was helping police investigation there. It is further to be noticed that he was also required to take care of the dead bodies to be sent for post mortem and then to arrange for their funeral. All this made him so busy that it is expected from him to divert his attention towards interrogating children who had been hurriedly left at his residence in village Alampur.

27. It is to be noticed that the children were found sleeping by the witnesses who had reached the spot in the early morning and in the circumstances, everybody thought that they may not be in knowledge of the incident. It is a matter of common knowledge that children are always kept apart from the dead body when they loose their mother in such an early age. If the children were kept away from the scene and were not immediately interrogated by the witnesses of the police. Similarly, when the father of children was busy with funeral etc. of dead bodies, he is not expected to know as to when one of the child was interrogated by police. In such a situation, in our opinion, the evidence of child witness Arvind Kumar cannot be disbelieved on this ground alone. After going through the evidence of the child witness Arvind Kumar, we are of the opinion that his conduct and demeanor during his examination in the court, is quite natural and relevant. His evidence in the circumstances was not appreciated by learned trial court in proper perspective which further finds support in material particulars from the confessional statement of co-accused Pooran Singh.

28. Learned counsel for the respondents accused person has further contended that accused person were not known to the child witness nor any identification parade was arranged for this purpose. In the circumstances, dock identification in the court is not sufficient. However, we are of the opinion that the child witness was not cross-examined at all by the defence on the point of identification as to whether the accused person are previously known to him or not. Since it is not disputed that accused Bhagwan Singh is a next door neighbour of deceased Mata Prasad. Similarly, accused Sultan Singh and Laxman also belong to same village i.e. Murawali. In such a situation, it is to be presumed that these accused persons are previously known to child witness and as such, there is nothing wrong in the dock identification by the witness in the court room. These accused

A persons have also been named by the child witness in his police case diary statement (Ex.D/4) and no cross-examination has been made of the witness regarding his mentioning names of accused person in his police case diary statement. Although, the fact of deceased Munni Devi being set to fire has not been mentioned in his police case diary statement, however, it has been clearly mentioned that her mouth was gauged by Bhagwan Singh and Laxman and Sultan Singh were assaulting her. He being a child witness, such minor discrepancies in his statement are but natural and in the circumstances, his statement clearly inspires confidence regarding involvement of the accused persons in the crime."

C

In our considered opinion, the evidence of the child witness suffers from serious infirmity due to omission of the prosecution in not holding test identification parade and not examining Agyaram to whom as alleged, the child first met after the incident. There are other circumstances discussed by the trial Judge, which also make the evidence of the child witness highly D unreliable for basing a conviction.

The law recognises the child as a competent witness but a child particularly at such a tender age of six years, who is unable to form a proper opinion about the nature of the incident because of immaturity of understanding, is not considered by the court to be a witness whose sole E testimony can be relied without other corroborative evidence. The evidence of child is required to be evaluated carefully because he is an easy prey to tutoring. Therefore, always the court looks for adequate corroboration from other evidence to his testimony. [*See Panchhi & Ors.* v. *State of U.P.*, [1998] 7 SCC 177]

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In the case before us, the trial Judge has recorded demeanour of the child. The child was vacillating in the course of his deposition. From a child of six years of age, absolute consistency in deposition cannot be expected but if it appears that there was a possibility of his being tutored the court should be careful in relying on his evidence. We have already noted above that G Agyaram, maternal uncle of the child, who first met him after the incident and took him along with his younger brothers to his father's village, has not been produced by the prosecution as witness in the court. It was most likely that if the child had seen the incident and identified the three accused, he would not have narrated it to Agyaram as the latter would have naturally H inquired about the same. The conduct of his father Radheshyam who was

produced as a witness by the prosecution is also unnatural that before recording the statement of the child by the police, he made no enquiries from the child.

We find some force in the submissions made by the learned counsel appearing for the State of Madhya Pradesh that looking to the age of child and his two younger brothers, it was most likely that they were with the mother and sleeping with her when she had gone to stay with her deceased father Mata Prasad. But the other possibility of the children being fast asleep when the elders of the house were attacked and killed cannot be ruled out as the incident is alleged to have happened in the midnight. Mere presence of the children in the house at the time of the incident is no assurance to the case of the prosecution that the eldest child got up on hearing hue and cries and had not only seen the incident but also identified the accused. Taking into consideration the child psychology a lad of six years having seen his mother being assaulted would have raised a cry; but he says that he quietly went back to sleep. It is also most unnatural even for a child that after witnessing his mother being assaulted by known persons he would go back to sleep to wake up late in the morning only when his maternal uncle Agyaram came to fetch him and his younger brothers to his father's village Alampur.

It is hazardous to rely on the sole testimony of the child witness as it is not available immediately after the occurrence of the incident and before there were any possibility of coaching and tutoring him. See : Paras 14 15 of *State of Assam* v. *Mafizuddin Ahmed,* [1983] 2 SCC 14. In that case evidence of child witness is appreciated and held unreliable thus :

> "14. The other direct evidence is the deposition of PW 7, the son of the deceased, a lad of 7 years. The High Court has observed in its Judgment :-
>
> > .....the evidence of a child witness is always dangerous unless it is available immediately after the occurrence and before there were any possibility of coaching and tutoring.
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> 15. A bare perusal of the deposition of PW-7 convinces us that he was vacillating throughout and has deposed as he was asked to depose either by his Nana or by his own uncle. It is true that we cannot expect much consistency in the deposition of this witness who was only a lad of 7 years. But from the tenor of his deposition it is evident that he was not a free agent and has been tutored at all stages by someone or the other".

A We have also taken note of the fact that even after the alleged involvement of the three accused by the child witness in his statement under Section 161 Cr.P.C to the police, no test identification parade was held. In such circumstances, in our opinion, mere dock identification of the accused by the child in the court cannot be accepted with certainty as a reliable identification [see *Japal Singh* v. *State of Punjab,* (1996) 4 Crimes 74 (SC)].
B

On the omission of not holding test identification parade the High Court has stated that the accused Bhagwan Singh lived in the neighbourhood of deceased Mata Prasad and the other two accused were also of the same village. Therefore, it was not necessary for the prosecution to have held a test
C identification parade when the accused was already known to the child.

In our opinion, the reason assigned to brush aside such an important omission of not holding a test identification parade is unconvincing. The child was aged about six years at the time of the incident. He used to live with his father and mother at Alampur. It has been mentioned in evidence of
D some of the witnesses that he used to come off and on with his mother and younger brothers to Murawali to live with the grandfather Mata Prasad. Looking to his age and understanding of the child even though he might have identified accused Bhagwan Singh who lived in the neighbourhood, it was most unlikely that he would have known other two accused who were merely residents of the same village Murawali. The High Court is not fully right in
E observing that the child was acquainted to three accused already and there was no necessity for the prosecution to have held a test identification parade. In our opinion, therefore, the High Court was wholly unjustified in taking a view of the testimony of child witness contrary to the one taken by the trial Judge and relying on it to convict the accused.

F The High Court has relied on judicial confession made by accused Pooran Singh against the present appellants/accused as a corroborative evidence to the eye-witness account of the child Arvind Kumar (PW-19).

With regard to the judicial confession made by acquitted accused Pooran
G Singh to the Judicial Magistrate, there are many striking features casting great doubt on the genuineness of the extra judicial confession which was retracted in writing by accused Pooran Singh in the course of his examination under Section 313 Cr.P.C. The accused Pooran Singh was also arrested along with co-accused under arrest memo (Ex.P18) on 12.3.1984. His extra judicial confession was recorded by the Judicial Magistrate (PW-1) on 09.4.1984
H when he was produced hand cuffed before him in police custody. The fact

that Pooran Singh was produced handcuffed in police custody on 09.4.1984 has been admitted by the Judicial Magistrate as PW-1 in statement made by him in cross-examination. If Pooran was in police custody, in accordance with the requirement of Section 164 Cr.P.C the Magistrate should have taken care to ascertain that there had been no third degree methods used by the police against him to extract a confession. The Magistrate in deposition as PW-1 *does* say that he questioned accused Pooran Singh and the latter confirmed that he was making a statement voluntarily without any pressure. But the record of confession (Ex.P1) does not show that any specific questions were put to accused Pooran Singh whether any physical or mental pressure was put on him by the investigating agency. The first precaution that a Judicial Magistrate is required to take is to prevent forcible extraction of confession by the prosecuting agency [See *State of U.P.* v. *Singhara Singh,* AIR (1964) SC 358. It has also held by this Court in the case of *Shivappa* v. *State of Karnataka,* [1995] 2 SCC 76 that the provisions of Section 164 Cr.P.C must be complied with not only in form, but in essence. Before proceeding to record the confessional statement, a searching enquiry must be made from the accused as to the custody from which he was produced and the treatment he had been receiving in such custody in order to ensure that there is no scope for doubt of any sort of extraneous influence proceeding from a source interested in the prosecution.

It has also been held that the Magistrate in particular should ask the accused as to why he wants to make a statement which surely shall go against his interest in the trial. He should be granted sufficient time for reflection. He should also be assured of protection from any sort of apprehended torture or pressure from police in case he declines to make a confessional statement. Unfortunately, in this case, the evidence of the Judicial Magistrate (PW-1) does not show that any such precaution was taken before recording the judicial confession.

The confession is also not recorded in *questions and answers* form which is the manner indicated in the criminal court rules. The confession was retracted before the trial Judge by the acquitted accused Pooran Singh on 28.7.1985 where, he disclosed that he was produced for judicial confession by telling him that he would be a prosecution witness as an approver. It is also stated that the police had met him in the jail and his signature was obtained on a statement. It appears that the accused Pooran Singh was in police custody when he was produced hand cuffed for recording judicial confession. The Judicial Magistrate also admitted in his statement that he was

A produced by the police through Police Station Daboh and after recording his statement, he was given back to the custody of police. There was, therefore, every possibility for accused Pooran Singh to have been physically and mentally pressurised for giving a judicial confession on an assurance that he would be made a prosecution witness as an approver. He has retracted his confession before the court on 28.7.1985 in the course of the trial and gave a statement in writing for retracting the judicial confession on 05.8.1985 in his examination as an accused after trial under Section 313 Cr.P.C. In his statement in writing under section 313 Cr.P.C, he stated that he was physically tortured and threatened by the police to agree for giving a false confession.

It has been held that there was custody of accused Pooran Singh with the police immediately preceding the making of the confession and it is sufficient to stamp the confession as involuntary and hence unreliable. A judicial confession not given voluntarily is unreliable more so when such a confession is retracted. It is not safe to rely on such judicial confession or even treat it as a corroborative piece of evidence in the case. When a judicial confession is found to be not voluntary and more so when it is retracted, in the absence of other reliable evidence, the conviction cannot be based on such retracted judicial confession. [See *Shankaria* v. *State of Rajasthan,* [1978] 3 SCC 435 para 23]

We find ourselves in agreement with the trial Judge that neither the sole testimony of the child witness nor the extra judicial confession conclusively prove the involvement and guilt of the three accused. In these circumstances, the evidence of recoveries of certain articles of the deceased on the alleged information, given by the accused is concerned, such evidence in itself is too weak a piece of evidence to sustain the conviction of the accused. The trial Judge has held that the recovery of a bottle under memorandum (Ex.P13) which is an article too ordinary to be stolen and religious book 'Vishram Sagar' with spectacles belonging to the house of the deceased were articles of little value which no accused would have carried after committing a crime.

So far as the motive is concerned, no doubt there was a civil dispute pending in civil court between deceased Mata Prasad and accused Bhagwan Singh but that cannot be said to be a motive strong enough for committing such a ghastly crime. At worst it raises strong suspicion against the accused.

It is not denied that village Murawali in District Bhind comes under dacoity affected area to which provisions of M.P. (Dacoity Vihavaran Kshetra)

Act, 1981 are applicable. In such circumstances, possibility of commission of the alleged crime by unknown criminals is not wholly ruled out. A

We also find that in this case, the prosecution has tried to rope in the appellants in the crime and have overdone their job by fabricating false evidence of overhearing by the witnesses the plan of murder and openly discussing about it after the completion of the plan. The said evidence was rightly not believed by both the courts. Similarly the evidence of recoveries of articles belonging to the deceased is also an attempt of fabricating some artificial evidence against the accused. B

For all the above reasons, our conclusion is that the High Court was not at all justified in reversing the verdict of acquittal passed by the trial Judge. In appeal against acquittal, the High Court is competent to reappreciate the evidence to find out whether the trial Judge has misappreciated any part of the evidence or not. Here the appreciation of the evidence made by the trial Judge is proper and the conclusions drawn are reasonable. The High Court, therefore, erred in reappreciating the evidence to substitute its own view for that of the trial Judge. C D

In the result, we allow this appeal. The impugned judgment of conviction and sentence passed by the High Court dated 11.3.2002 is hereby set aside and the judgment of acquittal dated 06.9.1985 passed by the trial court is maintained. The appellants have been re-arrested after their conviction and are undergoing sentence. As a result of their acquittal, they shall forthwith be set at liberty if they are not required in any other criminal case. E

G.N. Appeal allowed.